

U.S. Department of Labor

Employment Standards Administration  
Office of Workers' Compensation Programs  
Division of Federal Employees' Compensation  
Washington, D.C. 20210



File Number: A6-674240

Roy Selph  
Rt. 1, Box 14A  
Milan, GA 31060

Dear Mr. Selph:

This is in reference to your workers' compensation claim. Pursuant to your request for a hearing, the case file was transferred to the Branch of Hearings and Review.

A hearing was held on August 13, 2001. Based upon that hearing, it has been determined that the decision of the District Office should be reversed as outlined in the attached decision.

Future correspondence should be addressed to: U.S. Department of Labor, Office of Workers' Compensation Programs, 214 N. Hogan Street, Suite 1006, Jacksonville, FL 32202.

Sincerely,



Thomas VanTiem  
Hearing Representative

Enclosure

cc: Department of the Air Force  
Warner Robins Air Logistics Center  
78 SPTG-DPCEC  
215 Page Road, Suite 326  
Warner Robins Air Force Base, GA 31098

Paul Felser, Attorney-at-Law  
P. O. Box 10267  
Savannah, GA 31401

U.S. Department of Labor  
Office of Workers' Compensation Programs

---

DECISION OF THE HEARING REPRESENTATIVE

In the matter of the claim for compensation under Title 5, U.S. Code 8101 et seq. of Roy Selph, claimant; employed by Department of the Air Force. Case No.: A6-674240. Hearing was held on August 13, 2001 in Atlanta, Georgia.

---

The issues are: Whether the compensation paid from May 19, 1997 through November 30, 1999 is forfeit pursuant to Section 8106 of the Federal Employees' Compensation Act; whether there has been an overpayment of compensation in the amount of \$62,781 due to forfeiture of compensation for this period; whether the claimant is without fault in the creation of the overpayment and if so, whether circumstances justify waiver of recovery of the overpayment.

The claimant, born on October 22, 1941 (presently 60 years old), was employed as a Sheet Metal Mechanic on March 19, 1997 when he submitted Notice of Traumatic Injury and Claim for Compensation on Form CA-1, claiming that he injured his hip and back while in the performance of duty on March 18, 1997. He stated that he was on the floor working on a pipe and twisted around to pick up a hammer and when he did, he felt a pain in his back on the left side and in his hip. The Office accepted that the March 18, 1997 employment incident caused a low back strain and a herniated lumbar disc at L4-L5 and L5-S1. The claimant received continuation of pay from March 20, 1997 through May 18, 1997 and compensation for total wage loss from May 19, 1997 through February 28, 2000. The claimant elected OPM annuity benefits effective February 29, 2000.

The record reflects that, on February 3, 2000, the claimant was interviewed by Daisy Minson, special agent for the U.S. Department of Labor, Office of the Inspector General. The interview took place at Warner Robins Air Force Base. During this interview, the claimant acknowledged that he was elected to the Board of Commissioners of Telfair County in the latter part of 1996 and started serving as a Commissioner earning \$300 per month in January, 1997. He acknowledged that the Board met once a month at 5:00 p.m. for approximately two hours. He further acknowledged that he had signed affidavits on Form EN 1032 dated

November 5, 1997, November 16, 1998 and November 30, 1999. He stated that his wife filled out the first form on November 5, 1997 after they both reviewed it. He stated that he did not read the second form which he signed on November 16, 1998 but copied the information from the November 5, 1997 form. The claimant stated that he did not report his income from Telfair County on the affidavits because he was serving as a County Commissioner before his injury occurred on March 18, 1997. He stated that, if he had been elected Commissioner after he was injured and after he was receiving compensation, he would have reported the income on the affidavits. He stated that he was not trying to conceal the income, noting that he reported it on his income tax return. The claimant stated that he did not know that it was wrong not to report the income on the affidavits. (This information was contained in a memorandum of interview dated February 3, 2000 prepared by Daisy Minson).

The three affidavits which the claimant signed contained the following instructions with regard to reporting employment and earnings:

"Report ALL employment for which you received a salary, wages, income, sales commissions, piece work, or payment of any kind. Such employment includes service with the military forces of the United States, including the National Guard, Reserve component, or other affiliates.

Report ALL self-employment or involvement in business enterprises. These include but are not limited to: farming; sales work; operating a business, including a store or a restaurant; and providing services in exchange for money, goods, or other services. The kinds of services which you must report includes such activities as carpentry, mechanical work, painting, contracting, child care, odd jobs, etc. Report activities such as keeping books and records, or managing and/or overseeing a business of any kind, including a family business. Even if your activities were part-time or intermittent, you must report them.

Report as your "rate of pay" what you were paid. Include the value of such things as housing, meals, clothing, and reimbursed expenses, if they were received as part of your employment.



Report ANY work or ownership interest in any business enterprise, even if the business lost money or if profits or income were reinvested or paid to others. If you performed any duties in any business enterprise for which you were not paid, you must show as rate of pay what it would have cost the employer or organization to hire someone to perform the work or duties you did, even if your work was for yourself or a family member or relative. You need not list ownership in any publicly traded businesses.

SEVERE PENALTIES MAY BE APPLIED FOR FAILURE TO REPORT ALL WORK ACTIVITIES THOROUGHLY AND COMPLETELY.

The claimant was advised that the period of time covered by each affidavit consisted of the 15 months prior to the date he completed and signed the affidavit. On the first affidavit he completed on November 5, 1997, the only employment he listed was his employment as a Sheet Metal Mechanic from September 1996 to April 1997 (the job he held when injured on March 18, 1997). He also stated that he was not self-employed or involved in any business enterprise during the prior 15 months. On the remaining two affidavits, he stated that he did not work for any employer nor was he self-employed or involved in any business enterprise in the prior 15 months.

By Order dated January 24, 2001, the Office determined that the compensation paid from May 19, 1997 through November 30, 1999 was forfeit pursuant to the provisions of Section 8106 (b) of the Act. The Office concluded that the claimant had knowingly omitted reporting his earnings as a Commissioner when he completed the affidavits on Form EN 1032 dated November 5, 1997, November 16, 1998 and November 30, 1999. The Office determined that the compensation paid during the period covered by each affidavit was therefore forfeit. The Office also issued a preliminary determination on January 24, 2001 that there had been an overpayment of compensation in the amount of \$62,700.81 (the amount of the compensation paid to the claimant during the period of forfeiture) and found that the claimant was at fault in the creation of the overpayment.

The claimant subsequently requested a hearing which was held on August 13, 2001 in Atlanta, Georgia. At the hearing, the claimant was represented by Attorney Paul Felsner. Paul Tarauzser observed the hearing on behalf of the employing agency.

At the hearing, the claimant testified that it was his understanding that the questions about employment on the affidavit referred to whether he was doing any work at a job. He testified that he did not believe it referred to his service as a County Commissioner or the money he received for that service. He testified that he could not read or understand the affidavit form and that he filled out the first one with the help of his wife and the subsequent affidavits he simply copied his answers from the first form. He testified that he did not knowingly or intentionally fail to report on the affidavit the money he received for serving on the Board of County Supervisors. He testified that he first learned he had not completed the affidavits correctly when he was interviewed by the Department of Labor. He testified that his campaign to be elected as a member of the Board of County Supervisors consisted of putting up approximately 15 flyers. He testified that he did not make any speeches and that only one person ran against him. He testified that the Board met once a month, that there were five board members, and that the meetings were open to the public. He testified that there was a written agenda for each meeting and that he usually talked to the Secretary before the meeting who explained it to him. He testified that the District he represents is small, that he had lived there all his life, and that everybody in the District knew him.

The claimant's wife, Sandra Selph, also testified at the hearing. She testified that her husband asked her to read and explain the affidavit form to him. She testified that she understood the questions on the affidavit about employment to mean whether her husband had gotten another job (a regular 40 hour per week job). She testified that, since he already had the County Commissioner job when he was injured and since it only involved going to a meeting once a month, she told him it didn't need to be reported. She testified that she worked as an Accountant at the Department of Corrections. She testified that she took Bookkeeping in High School. She testified that they had their tax returns prepared for them by a former IRS auditor. She testified that the money her husband earned as a member of the Board of Supervisors was reported on their tax return.

Mather Stapleton also testified at the hearing. He testified that he had known the claimant all his life, that they grew up together in Milan, Georgia, and that he saw the claimant two to three times per week. He testified that the claimant's intellect was limited and that the claimant asked him to read the newspaper to him and explain it. He testified that Telfair County was one of the smallest counties in Georgia and was poor.



He testified that the County once had a Commissioner from the Jacksonville District that had no education and made an "x" when asked to sign something. He testified that, for his campaign, the claimant made 15 to 20 signs approximately 2' x 2' saying "Vote Roy R. Selph for Commissioner" and went around tacking them up in the District. He testified that the claimant had a reputation for honesty and truthfulness and that was why he was elected. He testified that the claimant was also good to his neighbors, using his tractor to plow little gardens for them.

Additional evidence submitted at the hearing included a report dated August 9, 2001 and test results from an adult education instructor at the Sarah Bullock Adult Learning Center in Eastman, Georgia. (Exhibit 1). The instructor noted that the claimant took the test for adult basic education on July 18, 2001 which indicated he was reading on the third grade, seven month level, had third grade level language skills, and had third grade, first month spelling skills.

Also submitted was a report dated August 10, 2001 from Donald Meck, Ph.D., a clinical psychologist (Exhibit 2). He indicated that he performed a clinical interview and mental status examination of the claimant and also administered the Wechsler Adult Intelligence Test - III (WAIT - III), the Wide Range Achievement Test (WRAT) and the Woodcock Johnson - R Tests of Achievement. He noted that the test results demonstrated a full scale IQ of 74 and opined that the claimant was functioning on the borderline range. He opined that the claimant's reading comprehension skills were limited and suggested functional illiteracy. He made the following comments at the conclusion of his report:

"The patient has a long standing language related learning disability manifest as reading comprehension problems and limited spelling ability. He will probably have difficulty understanding and comprehending any written material at the 6.0 grade level or above. Intellectual processes fall within the border line range. It is my professional opinion, based upon the following test findings, that this patient's ability to understand and comprehend the written record is rather limited and will compromise his ability to understand and agree to any written contractual obligations."

Also submitted were copies of the claimant's tax returns from 1997 through 2000 (Exhibit 4) a list of expenses and income (Exhibit 4) and a written argument submitted by his attorney (Exhibit 5).

Counsel for the claimant contended that the testing performed demonstrated a low level of verbal functioning and a language related learning disability with limited ability to understand and comprehend written words. Counsel contended that there was no evidence the claimant knowingly failed to report his employment on the Board of County of Commissioners when he failed to report it on the affidavits he completed on Form EN 1032. Counsel contended that the claimant's failure to report the income and employment was unintentional and due to ignorance. Counsel noted that the claimant did report the income to the government when he filed his tax returns. Counsel also pointed out that the money the claimant received for serving on the Board of County Commissioners would not affect his entitlement to compensation for wage loss since it was dissimilar employment and was being performed prior to the March 18, 1997 work injury.

The employing agency submitted comments on the transcript of the hearing dated September 2, 2001. The agency contended that the validity of the test results (Exhibit 1 and Exhibit 2) was questionable and cited the following reasons: The claimant graduated from high school; he had employment in a variety of positions in the private sector from May 1960 to April 1966; he successfully completed a correspondence course in Sheet Metal Work on April 19, 1967 and could type 50 words per minute; during his employment at Robins Air Force Base he successfully completed four training courses; he ran for and was elected to public office; and the tax records indicated he owned and managed several rental properties. The agency noted that they were unable to confirm that the claimant's earnings as a County Commissioner were included in his tax returns, since the W2 Forms showing the amount his wife earned were not included in the documentation. The agency further noted that the claimant's wife, who testified that she assisted the claimant in completing the affidavit, was employed in a job performing the duties of an accounting technician and this would indicate that she would have an understanding of basic accounting principles and would have regular dealings with governmental forms. It was also noted that, "this agency also provided advisement and assistance to Mr. Selph in the completion of these forms." The agency however, did not provide any details about the assistance they provided the claimant in connection with the completion of the



EN 1032 Forms. The agency also contended that the testimony provided by Mr. Stapleton demonstrated that the claimant was not totally disabled.

By correspondence dated October 5, 2001, Counsel for the claimant replied to the agency's comments. Counsel contended that the fact that the claimant was successful in obtaining and keeping employment did not negate the evidence which had been obtained indicating he was functionally illiterate. Counsel contended that the claimant had spent his lifetime, like many other functionally illiterate Americans, forging adaptive skills to compensate for his learning deficits. Counsel noted that the claimant's work had involved physical labor and working with his hands. Counsel further noted that the claimant's wife and friends had assisted him in many ways. Counsel further contended that the money the claimant received for serving on the Board was indeed reported to the IRS as demonstrated by the W2 Form issued to the claimant. Counsel further noted that the employing agency did not offer the claimant advice or assistance in completing the affidavit on Form EN 1032. Counsel noted that, if assistance had been provided, there may have not been an error.

The Act at 5 USC 8106 (b) (2) states in pertinent part:

"The Secretary of Labor may require a partially disabled employee to report his earnings from employment or self-employment, by affidavit or otherwise, in the manner and at the times the Secretary specifies... An employee who... knowingly omit(s) or understates any part of his earnings; forfeits his right to compensation with respect to any period for which the affidavit or report was required. Compensation forfeited under this Subsection, if already paid, shall be recovered by a deduction from the compensation payable to the employee or otherwise recovered under Section 8129 of this Title, unless recovery is waived under that Section."

The term "knowingly" is not defined within the Act or its implementing regulations. In common usage, the Board has recognized that the definition of "knowingly" includes such concepts as "with knowledge," "consciously," "intelligently," "willfully," or "intentionally."<sup>1</sup> Having carefully considered the entire record, I find that the evidence does not establish

<sup>1</sup> See Christine Burgess, 43 ECAB 449.



that the claimant knowingly failed to report the money he received for serving on the Board of County Commissioners when he completed the affidavits on Form EN 1032 dated November 5, 1997, November 16, 1998 and November 30, 1999.

According to the memorandum dated February 3, 2000 prepared by Special Agent Daisy Minson, the claimant told her on February 3, 2000 that he did not know it was wrong not to report the income he received as a County Commissioner when he completed the affidavits. According to Minson, the claimant cited the fact that he was already serving as a County Commissioner before the work injury. Had he started serving after the work injury, he stated that he would have reported the income. At the hearing on August 13, 2001, the claimant testified that he did not knowingly and intentionally fail to report the money he received for serving on the Board of County Commissioners when he completed the affidavits. He testified that he could not read and understand the affidavit form, that he filled out the first one with the help of his wife, and that he simply copied his answers from the first form onto the subsequent forms. He testified that it was his understanding that the questions about employment on the affidavit referred to whether he was doing any work at a job and that he did not believe the questions referred to his service as a County Commissioner or the money he received for that service. I find the claimant's testimony credible.

The results of the tests performed on July 18, 2001 and August 10, 2001 indicate that the claimant is functionally illiterate. Dr. Mack opined that the claimant's ability to understand and comprehend the written word was rather limited and "will compromise his ability to understand and agree to any written contractual obligations." The fact that the testing was only performed after the Decision dated January 24, 2001 was issued does not diminish its probative value. Dr. Meck is a clinical psychologist who interviewed the claimant and administered the testing. He did not indicate that there was any evidence that the test results were invalid due to efforts by the claimant to misrepresent his ability to read the written word. The fact that the claimant obtained this testing to substantiate his claim that he did not understand the questions posed on the EN1032 form does not diminish its probative value.

Testimony provided by Mr. Stapleton and the claimant's wife confirms that he has limited ability to read and understand the written word. The claimant relied on the advice provided to him by his wife when completing the first affidavit and although her advice was erroneous, the fact that he followed it does not

establish that he knowingly failed to report his income from serving on the Board of Commissioners when he completed the affidavits on Form EN 1032. Although the employing agency has indicated that they provided the claimant with assistance in completing the affidavits, the claimant disputes this. In the absence of corroborating evidence, I do not accept this as factual.

Although the evidence does establish that the claimant has held a number of jobs and has undergone training for those jobs, this by itself, does not establish that he has the ability to read and understand the information requested by the EN1032 forms. This holds true for the training and policy conferences the claimant attended in his capacity as a member of the Board of Commissioners for Telfair County. Counsel's contention that the claimant has forged adaptive skills to compensate for his inability to read has merit. The claimant's wife testified that she assisted the claimant in the completion of the EN1032 form; Mather Stapleton testified that he reads the newspaper to the claimant; the claimant himself testified that he asked the secretary before the Board meetings to explain the written agenda to him.

In view of the above findings, the Decision dated January 24, 2001 is hereby REVERSED. The preliminary determination concerning overpayment dated January 24, 2001 is also rescinded. The file is returned to the District Office for routine maintenance.

DATED:  
WASHINGTON, D.C.



Thomas Van Tiem  
Hearing Representative  
For  
Director, Office of Workers'  
Compensation Programs